

Synopsis of the criminal opinions by the Mississippi Court of Appeals on April 22, 2008.

Readus v. State, No. 2005-KA-01618-COA (Miss.App. April 22, 2008)

CRIME: Murder and Aggravated Assault

DECISION: Affirmed

COUNTY: Madison

MAJORITY: Ishee

FACTS: Kenneth Readus was convicted of the murder of his wife, Sherry, and one count of aggravated assault for shooting his step-son, Marlow Jackson. He was sentenced to life with a concurrent 20 years. On March 29, 2002, Readus returned from work to find that his wife was not home. She did not return home until early the next morning. Readus confronted Sherry and asked her where she had been. An argument ensued and Sherry called for help from her son, Marlow. Marlow admitted that he picked up a broom to defend his mother, but it is disputed as to whether he actually struck Readus with the broom. Marlow demanded that Readus leave. Readus drew a gun out of his pocket and pointed it at Marlow. Readus shot three times, once at him, once at his mother, and once into the kitchen. Readus claimed that he only intended to fire the gun in the air. He claimed that the gun discharged accidentally when Marlow tried to grab the gun out of his hand. According to Sherry's daughter, Yuvonda, when Marlow reached for the gun, Readus shot him. While fleeing, Yuvonda heard a second shot. The next door neighbor heard the shots coming from the Readuses' home. Shortly thereafter, she witnessed Readus leave the apartment. When she went over to investigate, she found Sherry lying on the floor with a gunshot wound to her stomach and blood coming from the back of her head. She also saw Marlow sitting up in a corner with a gunshot wound to his upper chest. Both Marlow and Sherry were transported to the hospital, but Sherry was pronounced dead on arrival. Readus turned himself into police later that evening. After signing a *Miranda* waiver, he admitted to pulling out a loaded .25 caliber pistol and shooting his wife and his stepson. Readus claimed that his decision to shoot came after his wife hit him with a broom, and they started "tussling." After the shooting, Readus drove to his mother's house. He admitted that he hid the pistol in his mother's storage room.

HELD: The trial judge did not err instructing the jury on the elements of both deliberate design murder and depraved heart murder, without telling the jury they had to unanimously agree on one or the other. It is not error to grant a jury instruction which combines the elements of deliberate design murder with the elements of depraved heart murder. The State produced evidence showing Readus was the person who shot the two victims. Readus himself admitted that he perpetrated the shooting. At the very least, the State produced evidence of depraved heart murder by establishing that while Readus was engaged in an argument with his wife, he fired shots inside an apartment that contained unarmed individuals and several children.

==>The evidence was sufficient to support the verdict. A rational juror could conclude beyond a reasonable doubt that Readus was guilty of both murder and aggravated assault. At the very least, the evidence in this case tends to show that Readus acted recklessly in the commission of an

imminently dangerous act and with extreme indifference to human life, thereby supporting the verdicts of both depraved heart murder and aggravated assault. Two eyewitnesses testified that Readus fired a gun inside an occupied apartment. Readus did not deny this fact, and he did not deny that he pulled out the gun with the intention of shooting it.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/Opinions/CO46669.pdf>

Smith v. State, No. 2006-KA-01728-COA (Miss.App. April 22, 2008)

CRIME: Sexual Battery

DECISION: Affirmed

COUNTY: Pontotoc

MAJORITY: Ishee

FACTS: Leslie W. Smith was convicted of three counts of sexual battery, and was sentenced to consecutive terms of 30 years with 10 suspended on each count. This case arose from complaints by C.C. that she was sexually molested by Smith. At the time, Smith was dating C.C.'s mother and living with the family. Count I alleged anal penetration, Count II alleged oral penetration, and Count III alleged cunnilingus. The State's request to amend the indictment to allege the victim was under 14 was denied by the court as prejudicial. C.C., who was 13 at the time of trial, testified that on numerous occasions Smith touched her with his private parts during the time he was dating C.C.'s mother. C.C. told her grandmother, who in turn, notified C.C.'s mother. However, both refused to believe her after Smith denied the allegations. C.C. was chastised for lying, and she was told that if she continued to lie she would be placed in a foster home. C.C. testified that as a result, she recanted her accusation. C.C. testified that she was reluctant to disclose any further abuse because she was convinced that no one would believe her. It was not until sometime later that C.C. mustered the courage to tell her stepmother and father, who then took her to see a social worker with MDHS. C.C. gave very detailed information concerning three specific instances of sexual abuse by Smith to two licensed social workers. The State also presented Dr. William Marcy who testified as an expert with a specialty in child abuse cases. Based on his exam, "at a minimum," C.C. had been subjected to anal rape, extensive fondling, and genital to genital contact. Smith offered several witnesses including C.C.'s mother, his mother, and himself in order to show that C.C. had fabricated her story.

HELD: Smith's indictment was sufficiently clear to give notice of which sexual battery offense he was being charged. Smith claimed that the indictment's inclusion of the language "under the age of 16 years" and the victim's date of birth tracked the language of two separate subsections of the sexual battery statute. The indictment is not fatally flawed because it tracked the language of both subsections (c) and (d) of §97-3-95(1). The indictment included the birth date of both Smith and the victim, as well as the time of the alleged offense. The fact that it mistakenly referred to the victim as being under the age of 16 instead of 14 is irrelevant. Simple math makes it easy to determine that at the time of the alleged offense, the victim was 9 years old and Smith was 25. Smith should have

reasonably anticipated being prosecuted under subsection (d).

==>Smith was not denied effective assistance of counsel because he failed to call an expert witness whom the court had given financial assistance to engage. He also claimed that his attorney failed to interview or contact witnesses prior to trial, investigate the case, and use a peremptory strike on a juror who knew several of the witnesses. Smith fails to show how an investigation would have significantly aided his case during trial. Smith was not required to call an expert of his own to refute the opinions of the State's expert. Smith's counsel attempted to cast doubt on the opinions of the State's experts during cross-examination. Smith provided no specific showing that the non-challenged juror was not fair and impartial.

==>The trial judge did not err in admitting hearsay testimony of the victim under the tender years exception in MRE 803(25). He claimed the victim had an apparent motive to lie. The trial judge conducted a hearing outside the jury's presence. After considering the evidence presented by the State, as well as the factors required of him under Rule 803(25), the trial judge determined that the time, content, and circumstances of the victim's statements provided substantial indicia of reliability. The record supports the trial judge's ruling.

==>The trial judge did not commit plain error in denying his challenges to three jurors during voir dire. Smith is procedurally barred from challenging two of the jurors on appeal because he failed to object to their presence on the jury at trial. The record lacks any showing that the trial judge abused his discretion by failing to dismiss the third juror for cause.

==>The evidence was sufficient to support the verdict. Among the evidence presented at trial were the testimonies of at least six witnesses, which showed a consistency in the victim's allegations. Further, expert testimony showed that the victim exhibited both the physical and psychological characteristics of a child who had been subjected to sexual abuse.

==>The trial judge did not err in failing to grant a mistrial sua sponte because he was denied a fair sentencing due to a strained relationship between him and his attorney. The trial court did not abuse its discretion. Several witnesses were called by Smith's attorney during sentencing to testify as to Smith's character.

==>Smith was also procedurally barred from raising a claim of error on several jury instructions for the first time on appeal.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/Opinions/CO47661.pdf>

Richardson v. State, No. 2007-KA-00767-COA (Miss.App. April 22, 2008)

CRIME: Fondling

DECISION: Affirmed

COUNTY: DeSoto
MAJORITY: Myers

FACTS: Jeffrey Allen Richardson was convicted of fondling and was sentenced to 5 years with 10 years PRS. On August 18, 2006, S.W., a 10 year-old child, woke to a strange popping noise in her bedroom. S.W. testified that after the noise stopped, she felt something touching her or poking her in her panties, or her "personal area." S.W. flew up, turned around, and saw someone run out of her room into the nearby bathroom. Then she heard the same person exit the bathroom, sit in the computer chair, and turn on the computer. S.W. went in her mother's bedroom and told her what had occurred. S.W.'s mother, T.M., confirmed this occurred. S.W. testified that Richardson then left for work a few minutes later, entering her mother's bedroom to say goodbye. T.M. testified that she and her daughter lived with Richardson, her boyfriend, at the time of the incident. T.M. also testified that the only persons in the home that morning, were herself, S.W., Richardson, and Richardson's son. Richardson testified that when he awoke and was going to the bathroom when he heard S.W. moving around in her bed and wanted to determine if anything was wrong. Richardson testified that he walked into her room, called her name, then touched her thigh and buttocks to try and wake her up. Richardson testified that he got no response from S.W., so he went to the restroom, checked on her again, and then went to play games on the computer before going to work.

HELD: The trial judge did not err in allowing the courtroom to be closed to the public during the testimony of the 11 year-old victim. The trial court closed the courtroom to the public only during the testimony of the victim. Richardson and his counsel remained in the courtroom during that testimony. The trial court noted that only 4 people were required to exit the courtroom during this testimony, and the courtroom was again opened once the victim's testimony was complete. The limitation was no broader than necessary to protect the victim during her testimony. The trial court did all it could to protect the rights of both the victim and Richardson.

==>The evidence was sufficient to prove lustful intent by Richardson in touching the victim. It was not necessary to prove that there was actual skin on skin contact between Richardson and the child. The victim testified Richardson touched or poked her "private area," an area that was covered by her panties. Richardson made several incriminating statements during his police interview, which indicated there was inappropriate touching. While Richardson's testimony conflicted with the witnesses for the State, the jury heard all the evidence and testimony and found Richardson guilty.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/Opinions/CO47531.pdf>

Middleton v. State, No. 2007-KA-01023-COA (Miss.App. April 22, 2008)

CRIME: Felony Child Abuse

DECISION: Affirmed

COUNTY: Panola

MAJORITY: Myers (Irving not participating)

FACTS: Andre Deshon Middleton was convicted of felony child abuse and sentenced to 25 years. On the morning of October 24, 2005, a baby was heard crying for about an hour at the Meadowview Apartments. A neighbor, Robert Williams, testified that he heard the baby's cry that morning and also heard something go across the neighbor's floor. Williams then heard a loud thump, and the baby's cries stopped suddenly. A few moments later, Middleton was seen walking down the apartment steps with a child in his arms, approaching his aunt's apartment. The aunt testified that Middleton brought the child, I.W., to her apartment because the child was not breathing. She called 911 and instructed Middleton to administer CPR. I.W. was taken by ambulance to the hospital. The ER doctor, Robert Smith, testified that I.W.'s right pupil was dilated more than the left, indicating possible brain injury. I.W. was less than a year old at the time of the injury. The child was transferred by helicopter to Le Bonheur Medical Center in Memphis for treatment. Presently, I.W. is permanently injured and will likely never gain the ability to walk. I.W. is unable to eat solid foods or talk as a normal child of his age. He will likely be in special education classes and need treatment for the rest of his life. Several doctors testified as experts that I.W.'s injuries were not the result of an accident, but by some human intervention or Shaken Baby Syndrome.

HELD: The trial judge did not err in allowing several doctors to testify as experts. All three of the doctors who testified stated that they could affirmatively rule out accidental injury as the cause of the victim's symptoms. All three doctors concluded that the cause of the injuries was not of an accidental nature and the symptoms exhibited by the victim pointed to some type of human intervention as the cause of the injuries since there was no evidence of external force trauma.

==> Middleton claimed that while one of the doctors was an expert with regard to reading x-rays, MRIs, and CT scans, he was not qualified to testify as an expert regarding the cause of the injury to the victim. The expert was a certified radiologist who specializes in the field of pediatric radiology. He was the pediatric radiologist who examined the victim's CT scans and MRIs during his stay at Le Bonheur. As the treating pediatric radiologist, he was properly allowed to testify to his impressions regarding the causes of the injuries, which he observed on the MRIs and CT scans of the victim.

==> Middleton also claimed that the court erred in allowing the testimony a doctor who related that the victim's injuries were characteristic of Shaken Baby Syndrome. This expert was board certified in pediatrics and in pediatric critical care medicine and has also lectured on Shaken Baby Syndrome in Memphis. The testimony by all three doctors acknowledged that in their medical opinion, Shaken Baby Syndrome appeared to be the most likely cause of the victim's severe brain injury. All three doctors clearly identified and defined the type of injuries present and clearly identified their basis for concluding the injury was most likely caused by adult intervention. There was no error in the trial court's admission of this expert testimony.

==> The trial judge also did not err in allowing an expert to testify regarding child abuse injuries, even though she had not physically examined the victim but only evaluated the victim's medical records. This witness was a pediatrician, an assistant professor of pediatrics at the University of Tennessee and Le Bonheur Children's Hospital, and the medical director for the Child Protection

Team at Le Bonheur. She was also board certified in pediatrics and has had further specialized training regarding child abuse. While she did not physically examine the victim, she instead relied on the medical records to support her testimony. Under MRE 703, this reliance is permissible.

==>The evidence was sufficient to support the victim. Although the State failed to present any evidence that a witness observed Middleton shaking the victim, several competent expert witnesses, some of whom treated the victim, testified regarding the injuries sustained by the victim. Several lay witnesses, including Middleton's aunt, family members of the victim, and a neighbor, testified to what they observed on the day the victim suffered his injuries.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/Opinions/CO47508.pdf>

Morgan v. State, No. 2007-CP-00428-COA (Miss.App. April 22, 2008)

CRIME: PCR – Burglary and Aggravated Assault of a LEO (habitual offender)

DECISION: Dismissal of PCR affirmed

COUNTY: Yalobusha

MAJORITY: Ishee

FACTS: Kerry Louis Morgan pled guilty in 2004 to burglary and aggravated assault of a LEO. He was sentenced to 30 years but placed under a term of 28 years and 11 months of PRS. Morgan was subsequently arrested for forgery. A hearing was held in March of 2005, at which the State put on evidence showing that Morgan committed four instances of forgery in November of 2004. Specifically, Morgan was accused of forging checks belonging to his stepfather and attempting to use them at several businesses. As a result, his post-release supervision was revoked. Morgan filed a PCR which was denied.

HELD: Morgan's revocation was not unlawful the trial court failed to sustain a conviction of forgery before sending Morgan to prison. It is not necessary that a defendant be convicted of crimes charged to suffer revocation of his probation. Morgan was accorded the minimum due process requirements to which he was entitled at his revocation hearing.

==>The trial judge did not err in failing to grant an evidentiary hearing before the trial court denied his PCR. The trial court's dismissal is consistent with the evidence and testimony presented in the record.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/Opinions/CO47655.pdf>

Lockhart v. State, No. 2007-CP-00523-COA (Miss.App. April 22, 2008)

CRIME: PCR – Burglary of a Dwelling

DECISION: Denial of PCR affirmed

COUNTY: Lauderdale

MAJORITY: Ishee (Roberts not participating)

FACTS: Frederick D. Lockhart pled guilty to burglary of a dwelling and was sentenced to 25 years after a blind plea. (The DA had agreed not to seek to have him sentenced as an habitual offender). Lockhart subsequently filed a PCR which was summarily denied. Lockhart appealed.

HELD: Lockhart was not denied effective assistance of counsel. Lockhart has failed to provide any evidence to show that his guilty plea was coerced. At Lockhart's plea hearing, the judge explained to him the charges against him, his rights, and the effects and consequences of the plea. Lockhart was specifically asked whether he was coerced into making the plea to which he responded that he was not.

==>Lockhart also failed to provide any evidence to support his claim that his indictment was factually defective. The circuit court found that Lockhart was properly indicted for the crime of burglary. Lockhart's attorney cannot be found deficient for failing to object to the indictment.

==>Lockhart's plea was voluntary. Lockhart claimed that his guilty plea was not made voluntarily because he was not advised of the nature of the charges against him. During the plea hearing, Lockhart testified that he understood the crime with which he was charged, as well as what the prosecution had to prove and the possible defenses available to him.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/Opinions/CO46671.pdf>

Rodgers v. State, No. 2007-CA-00348-COA (Miss.App. April 22, 2008)

CRIME: PCR – Murder

DECISION: Dismissal of PCR affirmed

COUNTY: Lee

MAJORITY: Myers

FACTS: James Rodgers was convicted of murder of and was sentenced to life. Prior to trial, Rodgers counsel filed a motion for a psychiatric examination. Although Rodgers was examined, a complete psychiatric exam was never performed to determine Rodgers's competence at the time of the alleged act or to assess Rodgers's mental competence to stand trial. Rodgers informed his counsel that he wished to proceed to trial without the psychiatric evaluation. Rodgers was subsequently convicted of murder. He filed a PCR and was granted an evidentiary hearing. Rodgers's counsel testified at the hearing that after a discussion as to possible defenses, determined that a psychiatric evaluation was unnecessary. Counsel testified that he based his conclusion on the fact that Rodgers was able to effectively communicate with him, relate his theory of defense, and identify possible witnesses that could be called to aid in his defense. After the hearing, the circuit

court also noted that Rodgers and his counsel discussed the defense of insanity and competency to stand trial. The court recognized that counsel's testimony established that Rodgers decided instead to rely on a theory of self-defense or accident. The court found that Rodgers was competent to stand trial and denied the PCR. Rodgers appealed.

HELD: The trial judge did not err in denying relief and finding Rodgers competent to stand trial. At the initial trial, Rodgers did request a psychiatric evaluation, which was granted by the circuit court. However, the psychiatric evaluation was never completed due to Rodgers's and his trial counsel's decision to waive that issue at trial. Neither Rodgers's trial counsel nor the circuit court found a reason or concern to question this decision to proceed without examination. Rodgers was granted an evidentiary hearing for the limited matter of determining whether he was competent to stand trial. Testimony revealed that neither Rodgers's trial counsel, nor the judge, found any reasonable probability that Rodgers was not competent to stand trial. The record shows that the circuit court's ruling was not manifestly against the overwhelming weight of the evidence.

To read the full opinion, click here:

<http://www.mssc.state.ms.us/Images/Opinions/CO47654.pdf>

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